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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 745

SAMUEL INSULL,

Petitioner,

vs.

NEW YORK WORLD-TELEGRAM CORPORATION, a corporation, ROY W. HOWARD, MEMPHIS PUBLISHING COMPANY, a corporation, EDWARD J. MEEMAN, INDIANAPOLIS TIMES PUBLISHING COMPANY, a corporation, WALTER LECKRONE, E. W. SCRIPPS COMPANY, a corporation, LOUIS B. SELTZER, DICK THORNBURG, HERALD-POST PUBLISHING CO., a corporation, EDWARD M. POOLEY, KNOXVILLE NEWS-SENTINEL PUBLISHING COMPANY, a corporation, LOYE W. MILLER, PITTSBURGH PRESS COMPANY, a corporation, WELDMAN W. FORSTER, NEW MEXICO STATE TRIBUNE COMPANY, a corporation, DAN BURROUGHS, and CHARLES T. LUCEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HOWARD ELLIS,
DON H. REUBEN,
GEORGE D. NEWTON, JR.,
Attorneys for Respondents.

Of Counsel:
KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS,
130 East Randolph Drive,
Chicago 1, Illinois.

BYRON-WARREN PRINTING COMPANY, CHICAGO

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Respondents pray that the writ of certiorari be denied.

QUESTIONS PRESENTED.

Respondents, in contrast to petitioner, believe the following questions are presented:

1. Is the question of service of process pursuant to Section 17 of the Illinois Civil Practice Act moot because an adverse judgment had previously been en-

tered against petitioner and in favor of one of the respondents in a separate suit involving the identical cause of action pleaded here?[1]

2. Did the Court of Appeals correctly follow the Illinois law in its holding that Section 17 of the Illinois Civil Practice Act does not, upon the instant record, authorize service of process upon respondents?

STATEMENT OF CASE.

We accept petitioner's statement as being accurate with one exception. Petitioner asserts (Petition, pp. 5-6): "In addition, it is a fair inference from paragraph 6 of each of the affidavits that each of the publishing companies employs reporters, advertising solicitors and other persons who are from time to time or temporarily within Illinois. R. 26, 29, 32, 34, 36, 38, 41, 43, 46." We do not believe the nine respondents' affidavits filed with the District Court can be so read and the opinion of the Court of Appeals did not so construe these affidavits.

REASONS FOR DENYING THE WRIT.

We oppose the granting of a writ of certiorari. No federal question whatsoever was adjudicated below; the lower court decided the question of service solely upon a correct application of the controlling Illinois law. Moreover, the posture of this case and the present status of Illinois law make it plain that the question petitioner seeks to bring here is premature. Accordingly, for several equally compelling reasons, the case is inappropriate for review by the Court.

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1. The opinion of the Court of Appeals shows this question was fully litigated below. We believe the issue to be intermeshed with the case and thus was necessarily brought here by petitioner. *Langnes* v. *Green*, 282 U. S. 531, 532-539 (1930); *Walling* v. *General Industries Co.*, 330 U. S. 545, 547 (1947).

Petitioner's contention that the Court should review this case because the lower court invalidated service for due process considerations is, we submit, clear error. The briefs below show that the only question of service the parties there presented was the construction of Section 17 of the Illinois Civil Practice Act;[2] the holding of the Court of Appeals stays strictly within this ambit. And since the lower court's opinion does not invalidate Section 17 it is beyond peradventure that no due process determination was ever made by that court. A due process question would only have been reached if the lower court had construed the statute to permit service. The court would then, and then alone, have been required to determine whether a state statute that sanctioned such service could be valid when mirrored against the due process clause. *Rosenthal* v. *Frankfort Distillers,* 193 F. 2d 137, 141 (5th Cir., 1951).[3]

Petitioner also contends that he has basis for seeking the writ because the decision below was not decided in accordance with applicable state law. This claim is likewise not sustainable. The District Court in Illinois and then the Court of Appeals found that the service in question was not supportable either under the "doing business" or the "commission of tort" provisions of Section 17 of the Illinois Practice Act. The holdings as to the lack of a "doing business" basis for jurisdiction are signally sup-

2. Respondents have lodged with the Clerk certified copies of the lower court briefs.

3. This Court has authoritatively defined allowable due process limits as to personal jurisdiction only when a lower court has asserted such jurisdiction. *Pennoyer* v. *Neff*, 95 U. S. 714 (1877); *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *Travelers Health Ass'n* v. *Virginia*, 339 U. S. 643 (1950); *McGee* v. *International Life Insurance Co.*, 355 U. S. 220 (1957); *Hanson* v. *Denckla*, 357 U. S. 235 (1958). Presumably a holding defining the outer perimeter of personal jurisdiction when such jurisdiction has been denied by the state law would constitute an advisory opinion. See *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 241 (1937).

ported by the Supreme Court of Illinois' latest utterance concerning Section 17. See *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73, *rehearing denied* (1959), cited and specifically relied upon in the opinion below. And for other cases considering Section 17 of the Illinois Practice Act and sustaining both lower courts' holdings see *Morgan* v. *Heckle*, 171 F. Supp. 482 (E. D. Ill., 1959); *Orton* v. *Woods Oil and Gas Co.*, 249 F. 2d 198 (7th Cir., 1957); and *Trippe Manufacturing Co.* v. *Spencer Gifts*, 270 F. 2d 821 (7th Cir., 1959).[4] So also, the lower courts'

4. The Illinois Supreme Court said in *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 436:

"In the present case, the record shows that the defendant, Addo Machine Company, Inc., is a corporation organized conformably to the laws of the State of New York and domiciled in that State. It is not licensed to do business within the State of Illinois. It manufactures adding machines outside of Illinois and ships these machines to purchasers throughout the United States. It does not and has not at any time maintained any offices in Illinois, nor employed any officers, agents or employees, or other persons within the State. From May 19, 1953, defendant, pursuant to the letter of that date addressed to plaintiffs, began to sell its machines to plaintiffs at a distributor discount rate. The sales were consummated when plaintiffs placed orders with the defendant in New York, and defendant accepted the orders, delivering its product to independent carriers in New York. On or about July 1, 1955, defendant advised plaintiffs that beginning October 1, 1955, they would no longer be exclusive distributors of defendant's products in the Greater Chicago Trading Area, and after the latter date defendant sold its machines at a distributor level and to the individual defendants and to other distributors. Defendant did not at any time own any interest in any corporation, partnership, or individual distributing its products in Illinois, and did not at any time have the right to exercise any control over the distributors: the relationship between defendant and distributor being that of seller and purchaser. After October 1, 1955, the defendant continued to sell equipment to plaintiffs on a dealer price level until January 1, 1956, when it declined to accept any further orders from plaintiffs.

"We concur in the conclusion of the Appellate Court that plaintiffs were not doing business in Illinois as defendant's agents. They were independent businessmen in Illinois selling their own merchandise which had been manufactured by the

"commission of tort" holdings are likewise manifestly in accord with the Illinois cases on the subject. *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N. E. 2d 673 (1957); *Winrod* v. *Time, Inc.*, 334 Ill. App. 59, 78 N. E. 2d 708 (1st Dist., 1948), *leave to appeal denied* 336 Ill. App. xiv (1948); see also *Putnam* v. *Triangle Publications*, 245 N. C. 432, 96 S. E. 2d 445 (1957). Clearly, the District Court and the Court of Appeals faithfully followed and properly applied the Illinois cases concerning the meaning and scope of Section 17 of the Illinois Civil Practice Act.

Petitioner, contending at the same time that the lower courts wrongly decided the case pursuant to Illinois law, also unequivocally concedes that the question concerning the pertinence of Section 17 of the Illinois Practice Act as to out of state publishers, has never been considered by the Illinois courts (Petition, p. 9). Section 17 is relatively new legislation and as yet the Supreme Court of Illinois has had slight opportunity to interpret it. (As presented immediately above, the holdings that have been made by the Illinois courts all support and sustain the opinion below.) This Court has most recently held that when a state has not passed upon a particular question of its law the Court will not venture into the area. *The Tungus* v. *Skovgaard*, 358 U. S. 588 (1959). The Court there said (p. 595):

> "• • • Yet the fact is that the New Jersey courts have simply not spoken upon the question of whether in a case such as this maritime law or common law is applicable under the State's Wrongful Death Act. In sum, there is no way of knowing whether New Jersey would impose uniform legal standards throughout its jurisdiction, or would apply in this case rules

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defendant. They were not transacting business for the defendant in Illinois; they were transacting business for themselves." In the *Grobark* case over $150,000 worth of defendant's machines was shipped into the state (See *Trippe Manufacturing Co.* v. *Spencer Gifts*, 270 F. 2d 821, 823 (7th Cir., 1959).)

> different from those that would govern if, instead of meeting his death aboard the *Tungus*, Skovgaard had been killed on the adjacent dock. An effort to resolve that question here, no less than the effort of the Court of Appeals, could be nothing but a prediction, a prediction that might tomorrow be proved wrong by the courts of New Jersey, which alone have power to render an authoritative interpretation."

Here too, we submit, a construction of Section 17 of the Illinois Civil Practice Act should not be made by this Court until the issue of service on out-of-state publishers has first come before the Illinois Supreme Court.

The petitioner suggests the Court should hear this cause because the Illinois courts have indicated that Section 17 extends to the reaches of due process; petitioner thus argues that a decision concerning Illinois service necessarily becomes a federal question. The argument that a federal question is raised because a state uses a federal enactment or right as a statutory criterion has been rejected by the Court no less than three times. *Miller's Executors* v. *Swann*, 150 U. S. 132, 136-137 (1893); *Shoshone Manufacturing Co.* v. *Rutter*, 177 U. S. 505, 508 (1900); *Louisville & Nashville R. R.* v. *Western Union Telegraph Co.*, 237 U. S. 300, 303 (1915). See also dissent of Holmes, *J.* in *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 213 (1921): As the Court said in *Miller's Executors* v. *Swann*, 150 U. S. 132, 136-137:

> "• • • The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question. A State may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the

> acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin."

Finally, we believe two considerations not noticed by the petitioner suggest certiorari should be denied. First, as the record and the opinions below disclose, respondents' circulation in Illinois is patently *de minimus;* it is apparent that Illinois is not an intended market or audience for any of the respondents' publications. We believe this Court should not consider the application of Section 17 of the Illinois Civil Practice Act to out-of-state publishers in such a context. Rather, such a determination, particularly when the Illinois courts have not spoken on the subject, better abides a case when the record contains evidence of some reasonable quantum of circulation within the state.[5]

A second, and we believe equally pertinent, reason for denying the writ is the fact that petitioner's proffered question of the construction of Section 17 should never be reached. As the record and opinion below show, during the pendency of this suit, in a separate action elsewhere and after a jury verdict, judgment was entered against the petitioner and in favor of one of the respondents. We thus moved below to dismiss the appeal and urge here, on the basis of the record of that separate proceeding, that petitioner is barred from this action; see *Bentley* v. *Teton*, 19 Ill. App. 2d 284, 153 N. E. 2d 495 (1st Dist., 1958); *Bruszewski* v. *United States*, 181 F. 2d 419 (3d Cir., 1950),

5. In *Polizzi* v. *Cowles*, 345 U. S. 663, 667 (1953), cited by petitioners, 50,000 copies of the publication in question were circulated in the state claiming jurisdiction.

cert. denied, 340 U. S. 865 (1950). Petitioner being collaterally estopped from proceeding here, the question concerning petitioner's claimed construction of Section 17 of the Illinois Civil Practice Act has become a moot inquiry. *Keely* v. *Ophir Hill Consol. Mining Co.*, 169 Fed. 601, 605 (8th Cir., 1909). We respectfully suggest that the Court would not want to reach any question concerning the interpretation of Section 17 of the Illinois Civil Practice Act or a possible due process question in such a context.

Respectfully submitted,

HOWARD ELLIS,
DON H. REUBEN,
GEORGE D. NEWTON, JR.,
Attorneys for Respondents.

Of Counsel:
KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS,
130 East Randolph Drive,
Chicago 1, Illinois.

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